INTRODUCTION TO PUBLIC LAW

OUTLINE OF CONSTITUTIONAL DOCUMENTS AND THEIR HISTORY

Historical Outline

- 1788-1855 → When Australian colonies were first formed, they were all independent of each other, but were all UK dependencies
    - Colonial Governors were initially military dictators; early Governors had more dictatorial powers than English monarchs in England
    - *Australian Courts Act 1828* (Imp) s 24: "All English common law and statute law received in NSW as of 25 July 1828"
- 1840's → changed from a military dictatorship to a representative government
- 1850's → the States/colonies were entitled to have their own Constitutions
- 1855 → Responsible Government
- 1900s → issues within the colonies led to Federation
    - Smaller colonies had the potential of losing their identities in the larger masses, and bigger colonies had the fear of having to subsidise smaller colonies
    - Fear of common enemies (expansion of German interests in the South Pacific and French)

Federation

- The prospect of Federation created both the opportunity and the necessity for Australians to fashion their own political order without the reliance on British models
- Federated on 1st Jan 1901 with the *Commonwealth of Australia Constitution Act 1900* (Imp)

The Colonial Legacy

- Despite Australia becoming a Commonwealth, it still wasn't free from any legislation passed with paramount force by the British Parliament
- The *Colonial Laws Validity Act 1865* (Imp) was still treated as applicable to Australia
- In *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130 → The HCA held that the repugnancy doctrine did still apply to Australia
    - Despite

***Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130**

- HCA held that the repugnancy doctrine did still apply to Australia
- Despite s 98 of the *Constitution,* which gives Parliament the power to make laws with respect to trade, the legislation in the *Navigation Act 1912* (Cth) were held to be invalid by repugnancy to the *Merchant Shipping Act 1984* (Imp)

***Commonwealth v Limerick Steamship Co Ltd* (1942) 35 CLR 69**

- The courts took a different view for this case: s 39(2) of the *Judiciary Act 1903* (Cth) sough to exclude the possibility of appeals to the Privy Council from the State Supreme Courts. The HCA held this provision to be valid, and not repugnant.
- It must be noted, that the argument for this case was not that the Australian Constitution overrode the *Colonials Laws Validity Act*, but that it overrode the particular Imperial Laws that would have otherwise given rise to repugnancy

***Commonwealth v Kreglinger & Fernau Ltd (Skin Wool Case)* (1926) 37 CLR 393**

- **Isaacs J:** the shipping regulations dealt with in the *Merchant Shipping Act* 1984 and held to prevail concerned themselves with non-Australian ships, and the substantive rights of other parts of the Empire were involved. The order in Council in question here is wholly concerned with Australian affairs, the local admiration of justice.
    - Development of responsible government throughout the Empire: in the present matter the Australian Constitution is superior to the earlier Act in question.

- Doctrine of extraterritoriality → Colonies had no international personality, and relied on the UK to conduct relations with foreign nations → REMOVED By the *Statute of Westminster*
    - S 3 of the *Statute of Westminster 1931* (Imp) allowed the "Parliament of a Dominion has full power to make laws having extra-territorial operation"
    - S 2(1) of the *Australia Act 1986* (Cth) allowed for "the legislative powers of the Parliament of each State include… laws for … that have extra-territorial operation"
    - The extraterritorial exercise of colonial legislative power was invalid unless its operation had sufficient connection with the geographical area of the legislating colony.
        - However, these extraterritorial limits were overstated; it was actually "within the limits of subjects and area of local legislature is supreme" (*Hodge v The Queen* (1883) 9 App Was 117)
    - Both the actual and intended operation of any exercise of governmental power will primarily be on persons and events within the territorial borders - however there are some cases where a sovereign state can legislate extraterritorially e.g. to regulate behaviour on its ships and aircraft, and citizens (e.g. *Crimes (Child Sex Tourism) Amendment Act 1994* (Cth))
- Doctrine of repugnancy → Imperial Parliament had superintending power over Australian colonial legislatures, the Commonwealth parliament and the Australian State Parliaments → REMOVED by the *Statute of Westminster*
    - Thus, if Imperial Parliament enacted a law meant to apply to the colonies, colonial Parliaments could not legislate to override that Imperial law.
- Doctrine of Paramount Force: An Imperial law that expressly stated to apply to a colony, or applied to a colony by necessary intent, would apply to that colony by paramount force. NB: This concept has still not been removed
    - E.g. the Constitution is still bound to Australia by paramount force. The *Australia Acts* did not remove paramount force. This is will we still obey the constitution.

The Colonial Laws Validity Act 1985

- Australian Colonies could now amend and repeal received Imperial legislation and English common law. But colonial legislation still could not be repugnant to Imperial statutes that applied to the colonies by paramount force

s 2	Any colonial law which was repugnant to a UK law extending to that colony was "absolutely void and inoperative"
s 3	In absence of such a conflict, no colonial law could be impeached for repugnancy

The Statute of Westminster 1931

- The *Statute of Westminster* was adopted by the Cth in 1942, but backdated to 1939
- Meant that the Commonwealth was free from Imperial restrictions
- It was a major landmark in the shift the notion of the 'British Empire' to the 'British Commonwealth of Nations'
- Applies to the Commonwealth (not the States individually)
- Australian colonies could not amend and repeal received Imperial legislation and English common law, but colonial legislation still could not be repugnant to Imperial statutes that applied to the colonies by paramount force

s 2(1) **s 2(2)**	*Colonial Laws Validity Act* no longer applied to Dominions The doctrine of repugnancy no longer applied to Dominions
s 3	Dominions given the power to enact extra territorial laws
s 4	Dominion consent needed for UK law to extend to that Dominion
s 8	*Commonwealth Constitution* not to be amended other than by prescribed procedure

The Australian Constitution (Geoffrey Sawer 1988)

- The Balfour Sport identified 5 matters in which there appeared to be conflict between the status so defined and existing British legal powers
    - 1. Royal style and titles —> in 1927 legislation passed to make it clear that the monarch was directly related to the Dominion governments, not indirectly through the British Government
    - 2. Position of the Governors-General —> in 1917 it was established that they are solely representatives on the Crown, and not in any sense representatives of or answerable to the British Government
    - 3. Operations of Dominion legislation; particularly the *Colonial Laws Validity Act 1865*
    - 4. British Shipping Merchant Legislation
    - 5. Privy Council Judicial Appeals
- British Parliament still had the power to legislate for the Dominion through paramount force. However, it was assumed that his power would never be exercised unless such legislation was refuted and consented to by the Parliament of the relevant Dominion
- Section 2 of the *Statute of Westminster* provided that the *Colonial Laws Validity Act* did not apply to the Dominions (including Australia). Under Section 4, British Parliament could still legislate for Australia, but only with the 'request and consent' of the Commonwealth Parliament.
    - Was then held to apply in the *Union Steamship Co* case
- Australia was reluctant to accept terms of the freedom given by the act:
    - The crucial provisions in the *Statute of Westminster* did not automatically apply to Australia. Under Section 10 it was left to them to adopt them if they chose to do so. Australia only adopted them in 1942

Australia Acts 1986

- The *Australia Acts* separated the UK law from Australian law and allowed Australian law to be independent
- These acts apply to State Parliaments
- NB: The Commonwealth was given the above powers first through the *Statute of Westminster*; whereas Australia could exercise extraterritorial powers later on (1986 as opposed to 1945 for the Cth receiving assent)
- DID NOT REMOVE THE DOCTRINES OF PARAMOUNT FORCE

s 1	No UK law passed after 1986 to apply to any part of Australia
s 2	Removed the doctrine of extraterritoriality - extra territorial powers given to the States
s 3	Doctrine of repugnancy & *CLVA* no longer apply to the States
s 6	Manner and form preserved
s 7(1) to s 7(5)	State Governors (1) Queen's representative in each State (2) All functions and powers of the Queen in respect of a State to be exercisable only by that State's Governor (3) Queen retains power to appoint/sack Governor (4) Queen many exercise power if personally present in the State (5) Queen to be advised by State Premier
s 8	State laws no longer subject to disallowance NB: complements the *Cth Constitution* s 59
s 9	State bills no longer subject to reservation

	NB: complements *Cth Constitution* s 60
s 10	UK has no further responsibility for the government of any State
s 11	No more appeals from the State Supreme Courts to the UK Privy Council. NB: the avenue to appeal from the HCA does exist in *Cth Constitution* s 74, however it is never used and will never be used (*Kirmani v Captain Book Cruises Pty Ltd (No 2)* (1985) 159 CLR 461
s 15	*Australia Act*, and *Statute of Westminster* may only be repealed or amended by Cth Parliament at the request or with the concurrence of all State Parliaments

- Kirby J dissented in *Attorney-General (WA) v Marquet* (2003) to the idea of s 6 and held that it was unconstitutional as it attempted to alter *Cth Constitution* ss 106 & 107
- UK Parliament and Cth Parliament passed virtually identical *Australia Acts 1986.* This was held as the final step in the severing of legal ties between the UK and Australia
    - The UK version was enacted "at the request and consent" of all Australian States. This was done in order to eradicate links between UK and Australia at every legislative level.
    - Cth version relied on the *Cth Constitution s 51* (xxxviii) power
    - HCA has relied on Cth version

***Sue v Hill* (1999) 199 CLR 462**

Facts	• Heather Hill stood for the Senate in QLD • Was disqualified because she had not renounced her UK citizenship • Argued that the UK was not a foreign power on the basis that so long as the UK retained any residual influence on legislative, executive or judicial processes in Australia, it could not be regarded as foreign
Legal Question	• Is the UK separate to Australia?

Judgement: Gleeson CJ, Gummow and Hayne JJ	• The effect of s 51(xxxviii) is to empower the Parliament 'to make laws with respect to the local exercise of any legislative power which, before federation, could not be exercised by the legislatures of the former Australian colonies'
	• Section 1 of the *Australia Act* does not purport to exclude, as a matter of the law of the United Kingdom, the effect of statutes thereafter enacted at Westminster. Rather, it denies their efficacy as part of the law of the Commonwealth, the States and Territories.
	• In making the appointment of a Governor General, the monarch acts on the advice of the Australian Prime Minister.
	• S 58 makes provision for the Governor-General to reserve a 'proposed law passed by both Houses of Parliament' for the Queen's pleasure, in which event the law shall not have any force unless and until, in the manner prescribed by s 60, The Governor General makes known the receipt of the Queen's assent.
	  ○ s 59 provides for disallowance by the Queen of any law within one year of the Governor Generals assent.
	  ▪ These arrangements for reservation and disallowance had been designed to ensure surveillance of colonial legislatures by the Imperial Government [496]
	• In the virtue of the equality of status which, from a constitutional as distant from a legal point of view, not exists between Great Britain and the self-governing Dominions

	• British Ministers to tender advice to the Crown against the views of Australian Ministers in any matter appertaining to the affairs of the Commonwealth would not be in accordance with Constitutional practice • Whilst the text of the Constitution has not changed, its operation has. • Reflects the changed identity of those upon whose advice the sovereign accepts that he or she is bound to act in Australian matters by reason, among other things, of the attitude taken since 1926 by the sovereign's advisers in the UK • The state of affairs now identified in these reasons is "the result of an orderly development - not… the result of a revolution" (Gibbs J) • The circumstance that the same monarch exercises regal functions under the constitutional arrangements in the UK and Australia does not deny the proposition that the UK is a foreign power within the meaning of s 44(i) of the Constitution
Conclusion	• Since the *Australia Act*, the UK retains no influence • By terminating any remaining appeals from the Australian courts to the Privy council, the Act had ensured that 'no institutions of government of the UK exercise any judicial powers with respect to this country' [493] • Only symbolic connection between UK and Australia; no legal connection

***Attorney-General (WA) v Marquet* (2003) 217 CLR 545**	
Facts	• Attempted to repeal of the *Electoral Distribution Act 1947* (WA), which sought to replace the State electoral distribution under that Act with a new, more equal distribution • This action was fettered by s 13 of the Act, which imposed manner and form requirements. The restraint imposed by s 13 was said to be rendered effective by s 6 of the *Australia Act*, which reduplicated the manner and form requirements that existed under the *Colonial Laws Validity Act*.
Legal Question	• Does UK have legislative power in Australia
Judgement - Gleeson CJ, Gummow and Hayne JJ	• The continuance of a State pursuant to s 106 is subject to any Commonwealth law enacted pursuant to the grant of legislative power in par (xxxviii) of s 51. • Thus, as in *Sue v Hill*, the majority based their reasoning solely on the Australian version of the *Australia Act*. • The *Australia Act* was constitutionally valid
Conclusion	• Formal declaration that the Commonwealth of Australia and the Australian states were completely constitutionally independent from the United Kingdom • NB: Kirby J in dissent: argued that the Australia Acts are unconstitutional because they were not passed by referendum according to s 128 of the Constitution – they were an attempt at a formal alternation to ss 106 and 107 for the Constitution (change to the constitutional powers of State Parliaments and to the Constitution of each State)

THE CONSTITUTION, ITS STRUCTURE AND PRINCIPLES

1. THE CONSTITUTION, ITS SOURCE AND STATUS

What is the Constitution?

- The law of laws
- The supreme law of the land
- Defined powers between:
    - Government branches
    - Levels of government

Issues with the Constitution

- Only 52% of people who were eligible to vote actually voted
- Only women in SA and WA were allowed to vote
- Indigenous Australians generally unable to vote
- Drafters were all men
- General ignorance and lack of knowledge about the Constitution also keeps it in force

Geoffrey Lindell, 'Why is Australia's Constitution Binding? - The Reasons in 1900 and now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29

The Answer in 1900

- Its legal status was derived from the fact that it was continued in an enactment of the British Imperial Parliament
- its political legitimacy was based on the words contained in the preamble, which refer to the people of the Australian colonies having agreed to unite in a 'Federal Commonwealth'
- Constitution was legally binding because of the status accorded to British Statues as original source of law in Australia, and also because of the supremacy accorded to such statutes
- Some important changes have taken place in relation to the constitutional and international status of the Australian nation since the enactment of the Constitution Act 1900
    - 1. The development of Australia's independence in the eyes of the international community
    - 2. The inability of the British Parliament legislate for Australia;
    - 3. The ability of both Commonwealth and State Parliaments to alter or repeal British statutes of any kind other than the Commonwealth Constitution and the Australia Acts
- Formal legal declaration to symbolise the attainment of independence have in the main been absent except for such enactments as the Statute of Westminster

The Answer in 1986

- It can be argued that the reason it is legally binding and the fundamental character of the Constitution is due to the agreement of people to federate, supported by the role given to them in approving proposals for constitutional alteration under s128 of the Constitution
    - The Constitution now enjoys its character as higher law because of the will and authority of the people
- Murphy J in *Bistricic v Rokov* (1976) 135 CLR 552 —> the Constitution was binding because of its "continuing acceptance by the Australian people"

- Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 —> The *Australia Act* "marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people"

***McGinty v Western Australia* (1996) 186 CLR 140**

Gummow J:

- Ultimate sovereignty resides with the authority or body which, according to the constitution, may amend the constitution
- In Australia, that ultimate authority, to change the Constitution itself is reposed by s 128 in a combination of a majority of the electors and a majority of the electors in a majority of States.
- The initiative to place before the electors any proposed change is vested in the Parliament and a particular mechanism is provided in s 128 to resolve disagreement between the Houses as the passage of a proposed law for the alteration of the Constitution
- s 128 does not provide for an equality of voting power at referendums. A negative power, in other words a power to reject changes, may be exercised by a minority of the total electors of the Commonwealth if that minority is a geographically distributed such as to constitute a majority in the majority of States
- Further conceptual problems: How can popular sovereignty be reconciled with the fact that Aboriginal and Torres Strait Islander people continue to assert their own sovereignty

George Williams, 'The High Court and the People' in Hugh Selby (ed), *Tomorrow's Law* (Federation Press, 1995) 271

- Only 52% of people eligible to vote in the referendum actually did so
- In any event, most women and many of Australia's Aboriginal people were excluded from voting
- Aboriginal people were not involved in the discussions that led to the drafting of the Constitution. As a result, until the Constitution was amended in 1967, Aboriginal people could not be included under s 127 of the Constitution
- The statistics demonstrate that, while the Constitution was supported was supported by a majority of people who actually voted, large sections of the community were excluded from voting and many people who were entitled to vote did not do so

Approval by acquiescence

- Deane J's novel idea in *Theophanous* was that the supremacy of the Constitution is not only based upon the will of the people as expressed in referenda but also in the continuing acquiescence of the people to the operation of the Constitution. However, there are some issues with this argument:
    - The people are reluctant to amend the Constitution. However, it cannot be assumed from this that the people continue to support, or even tactile approve of the Constitution
    - People are largely ignorant of the Constitution.
    - Lack of civics education in schools and the prevailing apathy in the community towards our politicians and our political processes are largely responsible for the ignorance of the Australian people about the Constitution
    - The Constitution is also, at least at face value, an uninspiring document

- This cannot amount to maintenance of the Constitution by the acquiescence of people. Ignorance cannot provide a foundation for the popular legitimacy of the Australian Constitution

Helen Irving, 'The People and their Conventions' in Michael Coper and George Williams (eds), *Power; Parliament and the People* (Federation Press, 1997) 113 NB: i don't like this opinion lmao

- The idea that 'popular' and 'democratic' can only be demonstrated where very large majorities of the total population participated, positively rules out probably most historical claims to a mandate, and effectively also obscures any difference between participatory processes where such a majority was not achieved
- What matters is less the statistics, and more the mechanism
    - What as 'popular' about the Federation process was that they required participation. The people's interests had to be acknowledged, their power to make or break the result, considered
- Although women did not have the vote in 4 colonies, we must not underestimate the significance of their franchise at the time in two
    - Women's enfranchisement in SA and WA was important in inspiring women to take part elsewhere in he campaigns, stimulating them to press harder for suffrage
    - Situation was far than ideal b today's standards but it was much worse everywhere else in the world
- The argument exists that so long as people are aware - or have had a reasonable opportunity to make themselves aware of the predetermined rules that may affect their behaviour, then if such people do not bother to find out what the rules are they must be taken to have given their implied consent - *Parker v South Eastern Railway (1877)* 2 CPD 416: an opinion made popular by the 'ticket cases' 19th century law
- Ultimate sovereignty resides with the Australian people - however in the years after; changes in the composition of the legal bench has meant that the notion of popular sovereignty has not steered constitutional interpretation is a generally more rights-protective direction
- Nicholas Aroney suggests that the notion of popular sovereignty may be 'out of place' as an interpretive idea in Australian constitutionalism

The Constitution and Indigenous Sovereignty

***Coe (No 1)* (1979)**

- HCA held that it was not the appropriate forum to question validity of an act of state
- The appellant sought to rely on the American concept of 'domestic dependent nation'. Though Jacobs and Murphy JJ thought that the claims relating to inherent land rights should be allowed to proceed, overall a majority of the Court refused leave to raise questions about the absolutely sovereignty said to rest with the Crown

***Mabo (No 2)* (1993)**

- Brennan J implied change of sovereignty upon British colonisation

***Coe (No 2)* (1993)**

Facts	- Plaintiff claimed that the Wiradjuri people are the owners of lands constituting a very large part of southern and central NSW. - Wiradjuri people are a domestic dependent nation, entitled to self-government and full rights over their traditional lands
Judgement; Mason CJ	- The Aboriginal people are subject to the laws of the Commonwealth and of the States and Territories in which they respectively reside - The history of the relationship between white settlers and Indigenous people has not been the same in Australia and in the United States, and it is not

	possible to say that the Aboriginal people of Australia are organised as a "distinct political society separated from others" (Marshall CJ)
Conclusion	- No Indigenous sovereignty. Native title is based on Crown's paramount sovereignty

***Walker* (1994)**	
Facts	- Defendants statement of claim alleged that the common law was only valid in its application to Aboriginal people to the extent to which it has been accepted by them - In oral submissions, counsel alleged that the question which arose was whether customary Aboriginal criminal law is something which has been recognised by the common law. Relied on a passage in Blackstone's *Commentaries* on the introduction of English law into a country that had been outside the King's dominions: o "Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony" -
Judgement; Mason CJ	- The legislature of New South Wales has power to make laws for the peace, welfare and good government in NSW for all cases whatsoever - Rejected the counsel's oral argument above on the basis that all people should stand equal before the law. A construction which results in different criminal sanctions applying to different persons for the same conduct offends that basic principle - Even if it be assumed that customary criminal law of Aboriginal people survived British settlement, it was extinguished by the passage of criminal statutes of general application
Notes	Indigenous people are subject to Cth and State laws

2. CONSTITUTIONAL STRUCTURE AND DOCTRINES

Separation of Powers

- Separation between legislative, executive and judicial
- Courts exercising power must be independent of both the State and Federal Governments
- There is no similar strict separation between legislative and executive power under the Westminster system, which Australia inherited from the UK. On the contrary, the executive is integrated into the legislature by the requirement that the ministers responsible for the departments of government must be Members of Parliament
- Three arms of government:
    - **Legislative function:** the making of new law, and the alternation/repeal of existing law
    - **Executive or administrative function:** the general and detailed carrying on of government according to law
    - **Judicial function:** the interpretation and application of law
- Do we have separation of powers in Australia?
    - Australia has partial separation:
        - Judiciary is very separate.
        - Overlaps between the executive and legislative functions

        - Idea of administration: because the executive has to give out welfare it then also needs to look at who is eligible and to that extent is applying the law which might also be a judicial function.
    - Principle of **Responsible Government** (principle of convention rather than constitutional rule).
        - *Constitution* section 64: Ministers administering various departments *must* be members of parliament – this is the closest thing in the constitution that instates responsible government. It also means the constitution mandates an overlap between the executive and legislature.
        - Ministers responsible for the departments of government are members of Parliament, accountable to it through mechanisms such as question time.
    - Examples where each of the arms breaches the strict notion of the separation of powers:
        - Executive looks at how to apply the law.
        - Executive's role in passing legislation.
        - Judicial activism and shaping of the common law to in effect create new laws.

Baron de Montesquieu*, The Spirit of the Laws* (transl Thomas Nugent, Hafner Press, 1949)
- Political liberty is to be found only where there is no abuse of power - There is no liberty if the judiciary power cannot be separated from the legislature and executive
Owen Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (Sweet and Maxwell, 7th ed, 1987)
- *The legislative function* is the making of the law, and the alternation or repeal of existing law - *The executive or administrative function* is the general and detailed carrying on of government according to the law - *The judicial function* consists in the interpretation of the law and its application by rule - A complete separation of powers, in the sense of a distraction of the three functions of government among three independent sets of organs with no overlapping or co-ordination, would (even if theoretically possible) bring the government to a standstill
Gerard Carney, 'Separation of Powers in the Westminster System' (1944) 8(2), *Legislative Studies* 59
- There seems to be no current constitutional system which adopts this complete separation of powers - The strict doctrine is only a theory and it has to give way to the realities of government where some overlap is inevitable - The Westminster system only afford a partial separation of powers (unlike the US system)   o At least in this formal sense, the framers of the Constitution in Australia were influenced by the American version of the 'separation of powers', but also by the Westminster system and the doctrine of responsible government - "The modern regulatory state which arrived after 1900 has put the traditional separation of powers under increasing strain" (Gummow, Hayne and Crennan JJ in *White v Director of Military Prosecutions* (2007) 231 CLR 570

Federalism

- Dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent
- Federalism ensures the existence of the State Governments
- We have a central government and State governments, each with their own governmental instructions
- The minimal essential features of Australia's federal system:
    - A high degree of autonomy for the governmental institutions of the State and Commonwealth
    - A division of power between these organisations
- A judicial 'umpire'
- Arguments for Federalism:
    - 'Voice' – "dual citizenship in a compound republic" enhances democratic participation. Localised democracy through the States allows individuals to participate more directly than in a monolithic unitary system of government.
    - 'Exit' means that citizens can move from one State to another if dissatisfied with conditions. This assumes freedom of movement between States is necessarily secured.
    - Citizens of a Federal state have more remedies and political resources to draw on. In the face of an oppressive state, they have the possibility of sheltering from its excesses beneath the sovereign powers of other levels of government. Federalist theory is not about prescribing substantive outcomes but rather enshrining institutional processes.
    - The division of powers between levels of government ensures that the state will not become too large or oppressive.
    - Toleration and pluralism is encouraged because no public good is presupposed, "Federalism provides a robust constitutional system that anchors pluralist democracy".
    - A Federal constitution is itself a bill of rights. The division of authority between spheres of government guarantees due process. This in turn promotes 'rights-oriented citizenship'.
        - E.g. NHRC was commissioned by pressure due to ACT and Vic having enacted human rights legislation.
    - States play a mediating role in delivering Commonwealth programs. Allows public goods to be more finely tailored to popular preferences.
- Arguments against Federalism:
    - People who reject federalism usually prefer more direct and unrestrained
    - democracy at the national level. State governments are viewed as unnecessary layers of bureaucracy
    - Where is the empirical evidence of the democratic benefits of federalism?
    - Many key areas affecting minority rights are left in State hands.
    - Government intervention may be a source of freedom.
    - Confusion of the rights of individuals with the rights of states. Some of the major intergovernmental conflicts in recent decades have been the
    - direct result of Federal intervention to secure the rights of minorities.
    - Narrow view of liberty as a negative condition, absence of external constraints on action.

Representative and Responsible Government

- Representative – chosen by the people
- Ministers responsible to Parliament
- Parliament responsible to voters

3. UNDERLYING PRINCPLES

Parliamentary Sovereignty

- The practice of responsible government depended on parliamentary sovereignty as the keystone of British law
- The Monarch and both houses of Parliament (Queen in Parliament) constitute Parliament
- Parliament can make and unmake laws
- Rules enforceable only if compliant with Act
- Case law can be overridden by Parliament
- In the UK, the Courts cannot declare an Act of Parliament as invalid
- UK Parliament can reconfigure itself, etc.
- UK Parliament cannot bind itself

AV Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 1st ed, 1885; 10th ed, 1959)

- *Nature of Parliamentary Sovereignty:* three bodies acting together
    - Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament
    - 'Any rule which will be enforced by the courts'
    - Any rule which will be enforced by the courts
    - Any act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts
- *The Vote of Parliamentary Electors*
    - The sole legal right of electors under the English constitution is to elect members of Parliament
    - Electors have no legal means of initiating, of sanctioning, or of repealing the legislation of Parliament
    - Their opinion can legally be expressed through the Parliament and through Parliament alone
- *The Law Courts*
    - A large proportion of English law is in reality made by the judges
    - Adhesion by our judges to prevent leads inevitably to the gradual formation by the courts of fixed rules for decision
    - Judicial legislation is, in short, subordinate legislation, carried on with the assent and subjective to the supervision of Parliament
- The plain truth is that as a matter of law, Parliament is the sovereign power in the state
- Equally true that in a political sense the electors are the most important part of the sovereign power
- Correct in regard to 'political' sovereignty as it is erroneous in regard to what we may term 'legal' sovereignty
- The external limit to the power of a sovereign: the possibility or certainty that his subjects, or a large number of them, will disobey or resist his laws
- The internal limit: the fact that the powers in accordance with his character are moulded by the circumstances under which he lives
    - Scientifically the power of the legislature is of course strictly limited

- Both from within and from without - from within because the legislature is the product of the times; and from without because the power of imposing laws is dependent upon the instinct of subordination, which is in itself limited.

CRITICISM'S OF DICEY'S PARLIAMENTARY SOVERIGNTY:

- Parliament is constrained by ancient constitutional principles, customs and moral values of the people e.g. it cannot pass retrospective criminal law statutes
- Parliament is now increasingly constrained by international treaties and agreements e.g. WTO. Also, sovereignty is bifurcated between federal and state levels of government under federalism

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Geoffrey de Q Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty (1985) 59 *Australian Law Journal* 276

- Dicey could not cite a single case in support of his absolutist and unbalanced view of the Constitution
- Repeated assertions that the very notion of sovereign power was unknown for Parliament or to the law… make it clear what Parliament had in mind was a government of laws and not of men

Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999)

- The doctrine of Parliamentary sovereignty was in sense an unreasoned article of faith. It was accepted on the ideas that: of

1. As a matter of either logical or practical necessity, there had to be a single, ultimate and unlimited law-making power in the kingdom
2. With the consent of his subjects in Parliament, the King exercised an absolute power to make law, conferred by and subject only to God
3. Parliament was the highest court in the land, the authority of last resort from which no appeal was possible, which could make new laws as well as interpret and apply old ones
4. If its authority were limited, Parliament might be unable to take extraordinary measures needed to protect the community in emergencies
5. Every generation must be equally free to make and change its law, as contemporary circumstances might require
6. All subjects were represented in Parliament, and were therefore deemed to consent to its acts and to be stopped from disrupting them
7. Parliament's decisions reflected the collective wisdom of the entire community, which, if not infallible, was far superior to that of any other agency in the state;
8. The ability of the King, Lords and Commons to check and balance one another was the best possible safeguard against tyranny
9. Judges could not be trusted with authority to nullify Parliament's judges
10. To limit Parliament powers to prevent it from abusing them would be to adopt a cure much more dangerous than the highly improbable disease of Parliamentary tyranny

WI Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1959)

inant characteristic of the British Constitution is the supremacy or sovereignty of Parliament
r, we have seen that Parliament does not have supreme power in this sense. It has power derived from

uently said that legislature is 'sovereign within its powers'
'ou can say that legislature is sovereign in respect of certain subjects, for it may then pass any sort of laws
n those subjects, but not on other subjects

Limitation of a sovereign power

- 'A sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment' (Dicey)
    - Highlights the difference between legal sovereignty and political sovereignty
- 'Legal sovereignty' = merely a name indicating that the legislature has for the time the power to make laws of any kind in the manner required by the law

TRS Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press, 1993)

- The courts' continuing adherence to the legal doctrine of sovereignty must entail commitment to some irreducible, minimum concept of the democratic principle.
    - However, this respect cannot be limitless
- The practice of judicial obedience to the statute obviously cannot itself based on the authority of the statute; it can only reflect judicial understanding of what political morality demands
- The legal authority of statute depends, on its final analysis, on its compatibility with the central core of that mortality which constitutes the rule of law

Rule of Law

- An implicit but underdefined part of Australia's constitutional system
- Government should 'under the law'

International Commission of Jurists, *The Rule of Law in a Free Society* - Report of the International Congress of Jurists, New Delhi 1959 (1959)

- Two ideals underlie this conception of the rule of law:
    - 1. All power in the State should be derived from and exercised in accordance with the law.
    - 2. The law itself is based on respect for the supreme value of human personality
- The rule of law = 'The Principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men"
- 'The Rule of Law' (2007) 66 *Cambridge Law Journal 67* —> 8 sub-rules for the rule of law
    - 1. Law must be accessible
    - 2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion
    - 3. The laws of the land should apply equally to all
    - 4. The law must afford adequate protection of fundamental human rights
    - 5. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve
    - 6. Public officers at all levels must exercise the powers conferred on them reasonably
    - 7. Adjudicative procedures provided by the state should be fair

- At the heart of the concept of the rule of law is the idea that society is governed by law —> *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409
- The Government should be under law, and the law should apply to and be observed by the Government and its agencies. Those who play a part in administrating the law should be independent and uninfluenced by Government in their roles. There should be ready access to the courts of law for those who seek legal remedy and relief. The law of the land should be certain, general and equal in its operation —> Sir Ninian Stephen, 'The Rule of Law' (2003) 22(2) *Dialogue* 8
- The Constitution is "framed in accordance with many traditional conceptions" some of which are "simply assumed" —> *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1
- Parliament is presumed not to intend the infringement of numerous common law rights and freedoms

Principle of legality

- Dicey —> Parliamentary sovereignty was the dominant characteristic of Britain's political institutions.
    - In Australia, however, Federalism led the drafters of the 1890's to embrace the American institution of judicial review. However, Dicey's ideas still had great influence
- "To establish personal liberty by constitutional restrictions upon the exercise of governmental power was not a guiding purpose in framing the Australian instrument, which in this respect departs widely from its American model" - *R v Federal Court of Bankruptcy; Ex party Lowenstein* (1938) 59 CLR 556; Dixon & Evan JJ

***Roach v Electoral Commissioner* (2007) 233 CLR 162; Gleeson CJ**

- The Australian constitution was not the product of a legal and political culture, or of historical circumstances.
- It was designed to give effect to an agreement for a federal union, under the Crown, of the peoples of formerly self-governing British colonies
- Despite being drafted mainly in Australia, it took the legal effect as an act of the Imperial parliament; most of the framers regarded themselves as British
- "Because the Constitution was federal in nature, there was necessary a distribution of governmental powers as between the Commonwealth and the constituent States with consequential limitation on the sovereignty of the Parliament and of that of the legislatures of the States" *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* [(1975) 135 CLR 1, 24]; Barwick CJ

AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885; 10th ed, 1959)

- The constitution is pervaded by the rule of law on the ground that the general principles of the constitution as with us as the result of judicial decisions; whereas under many foreign constitutions the security given to the rights of individual results, or appears to result, from the general principles of the constitution

- The 'rule of law' are not the spruce, but the consequence of the rights of individuals, as defined and enforced by the courts

Relationship between parliamentary sovereignty and the rule of law

- The sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of the law, whilst the predominance of rigid legality throughout our institutions evokes the exercise, and thus increases the authority of Parliamentary sovereignty
- Two characteristics of peculiarities in which do distinguish English Parliament from other sovereign powers
    - The commands of Parliament can be uttered only through the combined action of its 3 constituent parts; and must therefore always take the shape of formal and deliberate legislation
        - A bill which has passed into statute immediately becomes subject to judicial interpretation, and the English Bench has always refused to interpret an Act of Parliament otherwise than by reference to the words of the enactment
    - English Parliament has never, except at periods of revolution, exercised direct executive power or appointed the officials of the executive government
- 'The protection which the common law affords to the preservation of fundamental rights is, to a very substantial degree, secreted within the law of statutory interpretation' —> former Chief Justice James Spigelman (*Statutory Interpretation and Human Rights)* University of Queensland Press, 2008
- Judges power of interpreting statutes is probably the most frequent and effective means by which Parliamentary sovereignty is reconciled with the rule of law

***Potter v Minahan* (1908) 7 CLR 277**	
Facts	- Australian-born man with a Chinese father was refused entry into Australia under the White-Australia policy - Counsel argued that the legislature of the *Immigration Restriction Act 1901 (Cth)* had used the word 'immigrant' in a sense much wider than the ordinary meaning; that, in order to give full effect to the word, immigrating into Australian must mean 'entering'
Judgement (O'Connor J)	- There is nothing in the Act to justify the interpretation of the word in a sense so different from its ordinary meaning g - It is always necessary, in cases such as this where a Statute affects civil rights, to keep in view the principle of construction stated in Maxwell on Statutes – "there are certain objects which the legislature is presumed not to intend; and a construction which would lead to any of them is therefore to be avoided.' o One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication; or, in other words, beyond the immediate scope and object of the Statute - It cannot be denied that, subject to the Constitution, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community the right after absence to

	re-enter Australia unless it has so enacted by express terms or necessary implication
Notes	This is where the principle of legality comes from

- Statutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language – *Coco V The Queen* (1994) 179 CLR 427
    - The courts should not impute to the legislature an intention to interfere with fundamental rights… … general words will rarely be sufficient for that purpose
- Unless Parliament makes unmistakably clear its intention to abrogate or suspend a fundamental freedom, the courts will not construe a statute as having that operation – *Re Bolton; Ex parte Beane* [(1987) 162 CLR 514, 523]
- Principle of legality = the courts decline to impute to Parliament an intention to 'abrogate or curtail fundamental human rights or freedoms unless such an intention is clearly manifested by unambiguous language'

Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449

- Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights… The constraints upon its exercise by Parliament are ultimately political, not legal – *R v Secretary of State for the Home Department; Ex parte Simms* [[2000] 2 AC 115, 131]
    - The courts presume that even the most general words were intended to be subject to the basic rights of the individual

***Momcilovic v The Queen* (2011) 245 CLR 1**

- The rights and freedoms of the common law should not be thought to be unduly fragile
- Principle of legality protects 'commonly accepted' rights and freedoms
- The protection offered is not confined to rights, privileges and immunities.
- In the face of unambiguous language, the principle of legality is powerless to protect rights from legislative infringement
- The principle cannot be extended beyond its rationale: 'it excises to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values from being specifically affected din the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature' – *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; Gageler and Keane JJ